



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

July 11, 2003

Ref: 8ENF-T

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Steven H. Miller
Registered Agent for
Midcities Enterprises, LLC.
9104 N. Corral Ln.
Castle Rock, CO 80104

Corporation Service Company
Registered Agent for Coalton Acres, LLC.
1560 Broadway
Denver, CO 80202

Re: Notice of Proposed Assessment of
Administrative Civil Penalty,
Docket No. **CWA-08-2003-0072**
Facility Permit No. COR-032714

Dear Agents for Service of Process:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing ("Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against Midcities Enterprises, LLC and Coalton Acres, LLC pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. In the Complaint, EPA alleges that Midcities and Coalton Acres have violated section 301(a) of the Act, 33 U.S.C. § 1311(a), and the storm water requirements specified in Colorado Discharge Permit System ("CDPS") permit no. COR-030000. The Complaint proposes that a penalty of \$100,000 be assessed against Midcities and Coalton Acres for these violations.

You have the right to a hearing to contest the factual allegations in the Complaint or the appropriateness of the proposed penalty. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in administrative civil penalty assessments.

If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within thirty (30) days of your receipt of the enclosed Complaint to the EPA Region VIII Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA, Region VIII
999 18th Street, Suite 300



Printed on Recycled Paper

Denver, Colorado 80202-2466

If you do not file an answer within thirty (30) days [see 40 C.F.R. § 22.15(d)], you may be found in default. A default judgment may impose the full penalty proposed in the Complaint (\$100,000).

EPA encourages the consideration of Supplemental Environmental Projects (SEPs) in conjunction with civil penalties, in the settlement of civil enforcement cases. In case you are interested in this possibility, we have enclosed a copy of the EPA policy that describes the possibilities and limitations of SEPs in such matters. An agreement to perform a SEP may result in a lower cash penalty amount.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations (See 40 C.F.R. § 22.18). If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement signed by you and the delegated authority for EPA. Upon final approval of the consent agreement by the Regional Judicial Officer, Midcities and Coalton Acres will be bound by the terms of the consent agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. SBREFA does not eliminate your responsibility to comply with the Act and respond to this Complaint, nor does it create any new rights or defenses under law.

If you have any questions regarding this letter, the enclosed Complaint, or any other matters pertinent to compliance with the Act, the most knowledgeable people on my staff regarding these matters are Colleen Gillespie, Technical Enforcement, at (303) 312-6047 or David J. Janik, Supervisory Enforcement Attorney, at (303) 312-6917. If you are represented by an attorney, or to request a settlement conference, please call Mr. Janik. Please note that arranging for a settlement meeting does not relieve you of the need to file a timely answer to EPA's Complaint.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

1. Penalty Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice (40 C.F.R. Part 22)
3. Supplemental Environmental Projects Policy
4. Small Business Regulatory Enforcement and Fairness Act information
5. Memo from CDPHE

cc: Tina Artemis, Regional Hearing Clerk
Mark Pifher, CDPHE

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. **CWA-08-2003-0072**

In the Matter of:

Midcities Enterprises, LLC,
a Colorado corporation,
and
Coalton Acres, LLC,
a Delaware corporation
Respondents.

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**PENALTY COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

INTRODUCTION

1. This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA or the Act). 33 U.S.C. § 1319(g). The Environmental Protection Agency (EPA) regulations authorized by the statute are set out in part 122 of title 40 of the Code of Federal Regulations (C.F.R.), and violations of the statute, permits or EPA regulations constitute violations of that section of the Act. The rules for this proceeding are the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Rules of Practice”),” 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA official has been properly delegated the authority to issue this action. EPA has consulted with the State as required by the Act. 33 U.S.C. § 1319(g)(1).

3. EPA alleges that Respondents have violated the Act, permit and/or regulations and proposes the assessment of a civil penalty, as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondents have the right to a public hearing before an administrative law judge to disagree with (1) any fact stated (alleged) by EPA in the complaint, (2) the grounds for any legal defense or (3) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondents must file a written answer (and one copy) with the Regional Hearing Clerk (999 18th Street; Suite 300 (8RC); Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENTS’ RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A**

1 **DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE**
2 **COMPLAINT, OR UP TO THE MAXIMUM AUTHORIZED BY THE ACT.**

3
4 **QUICK RESOLUTION**
5

6 6. Respondents may resolve this proceeding at any time by paying the penalty amount proposed in
7 the complaint. Such payment need not contain any response to, or admission of, the allegations in the
8 complaint. Such payment constitutes a waiver of Respondents' right to contest the allegations and to
9 appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick
10 resolution process.

11
12 **SETTLEMENT NEGOTIATIONS**
13

14 7. EPA encourages discussing whether cases can be settled through informal settlement
15 conferences. If you want to pursue the possibility of settling this matter, or have any other questions,
16 contact David J. Janik, Supervisory Enforcement Attorney, at [1-800-227-8917 ; extension 6917 or 303-
17 312-6917] or the address below. **Please note that calling the attorney or requesting a settlement**
18 **conference does NOT delay the running of the 30 day period for filing an answer and requesting a**
19 **hearing.**

20
21 **GENERAL ALLEGATIONS**
22

23 The following general allegations apply to all times relevant to this action, and to each count of
24 this complaint:

25
26 8. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act
27 prohibits the discharge of pollutants into navigable waters of the United States, unless it is in compliance
28 with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).

29
30 9. Section 402 of the Act establishes a National Pollutant Discharge Elimination System (NPDES)
31 program, administered by EPA or State, to permit discharges into navigable waters, subject to specific
32 terms and conditions. 33 U.S.C. § 1342.

33
34
35 10. The Act requires that a discharge of storm water associated with an industrial activity to
36 navigable waters must comply with the requirements of an NPDES permit.
37 33 U.S.C. § 1342(p).

38
39 11. The Act authorized, and EPA issued, regulations that further define requirements for NPDES
40 permits for storm water discharges. 33 U.S.C. § 1318, § 1342(p). The regulations are found at 40 C.F.R.
41 part 122.

42
43 12. EPA regulations define discharges associated with industrial activity to include construction
44 activity. 40 C.F.R. § 122.26(b)(14)(x)

45
46 13. EPA regulations require each person who discharges storm water associated with industrial
47 activity to either apply for an individual permit or seek coverage under an existing and lawful general

1 permit. 40 C.F.R. § 122.26(c).

2

3 14. The State of Colorado has lawfully issued a general permit, under the authority of State law
4 and the Act, which authorizes the discharge of storm water associated with construction activities, if done
5 in compliance with the conditions of the permit. Colorado issued certification no. COR-032714 on April
6 10, 2000 which provided storm water permit coverage under permit no. COR-030000. Colorado permit
7 no. COR-030000; attached as exhibit A (“permit”).

8

9 15. The permit requires, among other things, that a person discharging pollutants develop and
10 implement an adequate storm water management plan (SWMP), conduct regular specified storm water
11 inspections, and implement best management practices (“BMPs”), etc. BMPs include structural controls
12 (such as sediment ponds and silt fences) and management practices (such as a dedicated concrete washout
13 area and street sweeping).

14

15 16. Respondent Midcities Enterprises, LLC is a limited liability corporation, incorporated in the
16 State of Colorado, and doing business in the State of Colorado. Respondent Coalton Acres, LLC is a
17 limited liability corporation, incorporated in the State of Delaware, and doing business in the State of
18 Colorado

19

20 17. Respondents are “persons” within the meaning of section 502(5) of the Act, and therefore
21 subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).

22

23 18. Respondent Midcities Enterprises, LLC is engaged in construction activities at a facility
24 located at 96th and Coalton Road in Broomfield, CO (“facility”). Respondent Coalton Acres, LLC owns
25 the facility.

26

27 19. Respondents engaged in construction activities at the facility at all times relevant to this
28 action.

29

30

31 20 Respondents are therefore engaged in an “industrial activity” as defined by EPA regulations.
32 40 C.F.R. § 122.26(b)(14).

33

34 21. Storm water, snow melt, surface drainage and run off water leaves Respondents’ facility and
35 goes into Autrey Reservoir.

36

37 22. The run off and drainage from Respondents’ facility is “storm water” as defined by EPA
38 regulations. 40 C.F.R. § 122.26(b)(13).

39

40 23. Storm water contains “pollutants” as defined by the Act. 33 U.S.C. § 1362(6).

41

42 24. The Autrey Reservoir drains into Rock Creek, which eventually reaches the South Platte
43 River. Autrey Reservoir, Rock Creek, and the South Platte River are “navigable waters” and “waters of
44 the United States,” as defined by the Act and EPA regulations, respectively. 33 U.S.C. § 1362(7);
45 40 C.F.R. § 122.2.

46

47 25. Respondents’ storm water runoff is the “discharge of a pollutant” as defined by EPA

1 regulations. 40 C.F.R. § 122.(b)(14)(x).

2

3 26. An authorized EPA employee entered the facility with the consent of Midcities on June 7,
4 2002 to inspect it for compliance with the statute, permit and regulations. The counts below outline
5 violations confirmed by the inspector.

6

7 27. Construction activities disturbing over five acres commenced at the facility in January 1999.
8 Respondents had control of the storm water management at the site beginning in Spring 2001.

9

10 28. Section 301 of the Act and the storm water regulations at 40 C.F.R. § 122.26 require that a
11 stormwater permit be obtained for construction activity including clearing, grading and excavation
12 disturbing at least five acres. Respondents are covered under the permit and subject to its terms and
13 conditions.

14

15 **COUNT 1**

16

17 29. At the time of that inspection, Respondents' SWMP did not contain the following required
18 components: a complete site description, a complete site map, and a narrative description of BMPs for
19 each stage of construction.

20

21 30. Respondents' failure to develop a complete SWMP as required by the permit constitutes
22 violations of the Act. 33 U.S.C. § 1319, § 1342(p).

23

24

25

26

27 **COUNT 2**

28

29 31. The permit requires Respondents to implement best management practices (BMPs) in order to
30 minimize the impact of Respondents' construction activities on waters of the United States. At the time
31 of the June 7, 2002 inspection, the following BMPs were not in place or were not being adequately
32 implemented: vehicle track out pads, a BMP to protect a canal from sediment, silt fences were not
33 adequately installed and/or maintained, BMPs along the street median, and inadequate BMPs at individual
34 sites within the development were not present.

35

36 32. Respondents' failure to implement BMPs as required by the permit constitutes violations of
37 the Act. 33 U.S.C. § 1319, § 1342(p).

38

39

40 **PROPOSED CIVIL PENALTY**

41

42 33. The Act authorizes the assessment of a civil penalty of up to \$27, 500 per day, for each
43 violation of the Act. 33 U.S.C. § 1319(g). The Act requires EPA to take into account the following
44 factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the violation;
45 Respondent's prior compliance history of such violations; Respondent's culpability for the violation; any
46 economic benefit or savings gained from the violation; and other factors that justice may require.

47

48 34. In light of the statutory factors and the specific facts of this case, EPA proposes that a penalty

1 of \$100,000 be assessed against Respondents for the violations alleged above, as explained below:

2
3 Nature, Circumstances, Extent, and Gravity of Violations

4
5 Respondents had control of storm water management at the facility beginning in the spring of
6 2001. The June 7, 2002 EPA inspection and Midcities Enterprises LLC's response to the
7 inspection revealed the following components were missing from the SWMP: a complete site
8 description, a complete site map, and a narrative description of BMPs for each stage of
9 construction. The June 7, 2002 EPA inspection revealed the following BMPs were not in place or
10 were not being implemented: vehicle track out pads, a BMP to protect a canal from sediment,
11 adequately installed and maintained silt fences, BMPs along the street median, and inadequate
12 BMPs at individual sites within the development were not present.

13
14 Prior Compliance History

15
16 This Complaint is the first enforcement action EPA Region 8 has issued to Respondents requiring
17 compliance with the applicable stormwater regulations.

18
19 Degree of Culpability

20
21 Respondents had control of storm water management at the facility beginning in the spring of
22 2001. Respondents had a copy of the storm water permit, and should have been aware of all the
23 requirements therein.

24
25 Economic Benefit

26
27 An economic benefit was experienced by Respondents for failure to comply with the stormwater
28 permit. Specifically, Respondents benefitted by not spending the required funds to adequately
29 maintain the vehicle track out pad and silt fences by June 7, 2002. Respondent also benefitted by
30 not preparing an adequate SWMP by May 2001. Additional information may be collected in
31 regard to this factor supporting a greater penalty adjustment.

32
33 Ability to Pay

34
35 **EPA did not reduce the proposed penalty due to this factor, but will consider any new**
36 **information Respondents may present regarding Respondents' ability to pay the penalty**
37 **proposed in this Complaint.**

38
39 Other Matters that Justice may Require

40
41 No adjustments made regarding these factors at this time.

42
43 35. As required by the Act, prior to the assessment of a civil penalty, EPA will provide public
44 notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and
45 present evidence in the event a hearing is held. 33 U.S.C. § 1319(g)(4).

46
47 36. The ALJ is not bound by EPA's penalty policy or the penalty proposed by EPA, and may

1 assess a penalty above the proposed amount, up to the \$27,500 per day per violation authorized in the
2 statute.

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4 To discuss settlement or ask any questions you may have about this case or process, please contact
5 David J. Janik, Supervisory Enforcement Attorney, at 303-312-6917, or the address below.

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United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
999 18th Street, Suite 300 (ENF-L)
Denver, CO 80202

Date: 7/9/03

By: SIGNED

Carol Rushin

Assistant Regional Administrator

SIGNED

David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JULY 11, 2003.